# IN THE SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1961**

## No. 554

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LAWRENCE ROBINSON,

*Appellant,*

—v.—

THE PEOPLE OF THE STATE OF CALIFORNIA,

*Appellee.*

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## APPELLANT'S REPLY BRIEF

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**A. Section 11,721 of the Health and Safety Code Denies Appellant's Right, Under the 14th Amendment of the United States Constitution, to Due Process and to Equal Protection of the Laws in That:**

(1) *The Said Statute Punishes a Status, Not an Act or Omission.*

While appellee assures the court that the punishment of a status has always been an accepted concept of English and American jurisprudence, several important considerations are overlooked by appellee. In the first place, the English Vagrancy Statute has evolved from a crime of status to the proscription of certain specific acts. Whether or not this has been done in the name of Constitutional Rights, specifically set forth as in our own state and federal constitutions, or merely as a matter of pragmatic evolution of justice, is unimportant. The fact is that it has been

done. In fact, we may take little comfort in relying upon what has happened under English practice when constitutional considerations are before the court. This is true because of the absence of the specifically established rights such as those in the Bills of Rights of the American Jurisdiction.

With respect to the long continued existence of the Vagrancy Laws under the said American Constitutions, it is interesting that in not one case cited by appellee has the United States Supreme Court sustained the validity of such statutes. This, then, makes our present case one of first impression as far as our highest court is concerned. It may be, therefore, that the fact that we have no such decision is not to be credited to the validity of the law as much as to the inability of the typical vagrancy defendant to prosecute his case into the higher courts. This court has, in fact, rendered decisions in connection with vagrancy appeals in at least two instances. In *Lanzetta* v. *New Jersey,* 306 U.S. 451, the "gangster statute" was held unconstitutional, as hereinafter discussed. In the other such case, *Edelman* v. *California,* 344 U.S. 357, 97 L. Ed. 387, two justices of this honorable Court (Black and Douglas, dissenting) held that the section of the California Vagrancy Statute then before the court was clearly unconstitutional, with the majority of this court dismissing the appeal for procedural irregularities.

May we here call the Court's attention to the excellent discussion of the problem here involved in the New York University Law Review, Vol. 37, p. 102, "Vagrancy Reconsidered," which might well have been written in answer to this p ·se of appellee's position. The authors discuss the authorities cited by appellees, together with a number of other learned writers, in arriving at our position that the statute is unconstitutional. With respect to the unrea-

sonableness of the penalization of status, the authors state (p. 108): "Deterrence is realized only when the stimulus is directed toward the actual source of harm. Status criminality differs radically in this respect from conduct criminality. Essential elements of criminal theory—conduct and causation—are ignored or distorted in an attempt to prevent crime through punishment of vagrancy. . . .

"The second basic theoretical distinction between conduct criminality and status criminality is that the latter requires no evidence of actual causation. Recognition of the element of causation is limited to a presumption that the necessary certainty of a cause and effect exists in the relationship between status group and the anticipated future criminal conduct. This presumption does not conform to the basic proposition that there must be some 'rational connection between the fact proved and the ultimate fact presumed.' Status criminality substitutes *suspicion causation* for actual causation. Suspicion causation does not require that 'degree of certainty, regularity, uniformity, and predictability' necessary to demonstrate a causal relation. Until one who has assumed a proscribed status has in fact engaged in criminal conduct, the law at most can make only a qualified guess as to whether a member of the status group is a potential criminal. Under these circumstances, sanctions are meaningless. The stimulus-response basis of criminal law presupposes a clear relationship between the object to be stimulated and the result anticipated. . . .

"Status criminality—over-inclusive in its scope—fails to recognize that there is no inevitable relationship between the behavioral characteristics it seeks to punish and the commission of future crimes, a necessary theoretical conclusion substantiated by actual experience. The imposition of sanctions under such circumstances is meaningless."

We shall quote heavily in the remainder of this brief from the article "Vagrancy Reconsidered," *supra*, which is the most complete and lucid treatment of this subject which this counsel has found to date.

(2) *The Statute Punishes an Involuntary Status.*

While appellees are "fast and loose" with the term "preposterous" in referring to this portion of the argument which this Court deemed of sufficient merit to warrant a hearing, we submit that the analogies submitted in support of this position by appellee are not convincing. The intent of the person who begins to use narcotics is no different from that of a person whose act might result in venereal disease or in becoming an alcoholic. Those well acquainted with the problem know that no addict ever intended to become such. In fact, it is impossible to conceive of the real nature of addiction until one has in fact become addicted, so that it may never be said that one intended the result which he now becomes acquainted with in retrospect.

The attitude and motives of a person who takes a "joy-pop" of heroin is, morally or criminally, no different from that of one who takes a "shot" of whiskey, except perhaps there is the added thrill of the forbidden fruit, no longer present in alcoholic indulgence since the Repeal of the Eighteenth Amendment. The purpose in either case, is to be sociable, to escape the problems of the moment, to feel good or "high." Furthermore, narcotics have been such a hush-hush, little understood, subject until recently that there is an amazing ignorance, until it is too late, of the extremely compulsive and addictive attributes of those products taken at first for pleasure and escape.

Thus, the intent, at most, is to use. The condition which we are here considering is, in itself, an innocent, unintended result of an admittedly wrongful act. In fact, very few

addicts will admit this condition, so reluctant are they to accept the fact that they do not have control over the use of the narcotic and that they are in that despised and helpless category of persons whom the present law classifies as criminals.

(3) *It Punishes a Condition of Mental and Physical Illness.*

Were we able to cite judicial authority specifically in point under this head, we would not have before us a case of first impression. The argument of appellee would thus defeat any such case, so that every time a lawyer wanders into new territory in his quest for justice, he would be defeated by his inability to show a specific case in point.

On the other hand, we have presented the uncontradicted facts which show that we are here punishing the condition of mental and physical illness. It follows upon this, it seems to appellant, that due process would then step in to prevent penal treatment. We have presented the closest analogies that we could find on this point, and we feel that the problem is not one of legislative discretion but rather one of legislative limitation by the requirements of reasonableness, logic, and common sense.

(4) *It Is Vague, Indefinite and Uncertain.*

We return at this point to "Vagrancy Reconsidered":

State legislative definitions of "vagrancy" generally have taken two forms: (1) provisions which are merely colorful epithets, e.g., "rogues and vagabonds," "common drunkard," "habitual loafers," "gamesters," "lewd, wanton and lascivious persons," "brawler," "common prostitute," "stubborn children," "habitual gamblers," and "idle and disorderly persons," and (2) provisions which further attempt to define vagrancy in terms of a particular mode of life, e.g.,

"idle or dissolute," "leading an idle, immoral or profligate course of life," "no visible means of living," "associate of known thieves," "loitering," and "without being able to account for their lawful presence." It is submitted such penal classifications are inherently vague and unreasonable, violating the due process and equal protection clauses of the Fourteenth Amendment. Op. cit., p. 121.

In *Lanzetta* v. *New Jersey*, the Court was faced with void-for-vagueness challenge to a New Jersey act which prohibited being a "gangster," a crime of status similar to those included within the vagrancy concept. Justice Butler, speaking for a unanimous Court, concluded: "The challenged provision *condemns no act or omission;* the term it employs to indicate what it purports to denounce is so vague, indefinite and uncertain that it must be condemned as repugnant to the due process clause of the Fourteenth Amendment." *Lanzetta* appears to pull the procedural Amendment." Lanzetta appears to pull the procedural due process foundation out from under the vagrancy concept.

The case involved a New Jersey statute of the type that seek to control "vagrancy." *These statutes are in a class by themselves,* in view of the familiar abuses to which they are put. . . . *Definiteness is designedly avoided* so as to allow the net to be cast at large, to enable men to be caught who are so vaguely undesirable in the eyes of the police and prosecution, although not chargeable with any particular offense. In short, these "vagrancy statutes" and laws against "gangs" are not fenced in by the text of the statute *or* by the subject matter (the two opposing void-for-vagueness interpretations) so as to give notice of conduct to be avoided. Frankfurter, *J.*, dissenting in *Winters* v. *New York*, 333 U.S. 507, 540.

In the more recent case of *Edelman* v. *California,* the Court—presented with a conviction for being a "dissolute person"—dismissed the writ of certiorari as improvidently granted. Justice Black, with whom Justice Douglas concurred, dissented and went on to consider the merits: "The ambiguity and consequent broad reach of this crime of 'dissoluteness' is patent. . . . The provision of this vagrancy statute on its face and as enforced against petitioner is too vague to meet the safeguarding standards of due process of law in this country." A similar view was expressed by Lord Justice Scott in the leading English case of *Ledwith* v. *Roberts,* (1937) 1 K.B. 232 (C.A. 1936): "It seems to me wrong that these old phrases should still be made the occasion of arrest and prosecutions, when . . . the class against which the legislation was directed has ceased to exist. . . . The old phrases have today lost their meaning, but they remain on the Statute Book as vague and indefinite words of reproach. . . . Clear and definite language is essential in penal laws."

In the *Newbern* case the California Supreme Court unanimously held that the "common drunkard" provision of the state vagrancy statute was unconstitutionally vague: "The legal impediment in the statute . . . is that it fails to include a standard of *what inordinate use* of intoxicants makes a person a common drunkard. By its terms the statute leaves to the individual judge or jury the determination of the meaning of the law as well as what proven facts render the accused guilty or innocent." *In re Newbern,* 350 P. 2d 123, 3 Cal. Rptr. 371.

(5) *Double Jeopardy Is Inherent in a Crime of Status.*

Appellee's basic objection to this and the following two sub-sections of our argument, is that the particular provision is not shown to be applicable to the present appellant. We submit, however, that the case principally relied upon

for this position, *United States* v. *Raines*, 362 U.S. 17, 4 L. Ed. 2d 524, had in mind an entirely different situation, one in which a statute generally constitutional is attempted to be invalidated because it might have, in some conceivable contexts, an unconstitutional application.

In our instant case we are faced with the exact reverse situation, one in which we have an actual, not a moot, case, first of all. Secondly, the rule would appear to be that when a present appellant or petitioner can in fact show the unconstitutional application of a law to him or its unconstitutionality upon its face, then the entire scheme of legislation and its entire effect may be shown. See *Thornhill* v. *Alabama*, 310 U.S. 88; *Lanzetta* v. *New Jersey*, 306 U.S. 451.

(6) *The Statute Is an Unwarranted and Unconstitutional Infringement on Freedom of Movement.*

Appellee's argument against our position under this head is, in a word, that addicts should be punished for their condition, without a specific showing of use or possession of a narcotic, simply because they are inclined to commit crimes of addiction or derivative crimes. This approach has been effectively dealt with in "Vagrancy Reconsidered":

The inherent unreasonableness in the criminal treatment of vagrants lies in the fact that, in this class of so-called crimes, we are punishing potential crime, suspected crime, or mere intent to commit crime, at the very most. Under a constitutional system in which arrest on suspicion alone is generally condemned, it seems highly improper and constitutionally suspect to punish as a crime a status which it is thought might be conducive to indulgence in crime. By such legislation, we give coup-de-grace to the unfortunate elements in our population for whom we have given little enough opportunity for education or employment, thereby making them further scapegoats for our social failures.

Vagrancy legislation is necessarily unconstitutional on its face—void-for-vagueness as it violates procedural due process and unreasonable in its classifications under equal protection principles and, more broadly, substantive due process—because it is a manifestation of a concept which attempts to punish a present state of being or a particular type of person. It should be evident that such efforts to identify future criminals inevitably raise constitutional questions. A recent bar association report on the disorderly conduct provisions of the new Illinois Criminal Code summarizes the inescapable problem: "Activity of this sort is so varied and contingent upon surrounding circumstances as to almost defy definition."

(7) *It Is Ex Post Facto.*

The analogy of possession of alcohol is unhappy with respect to the condition of narcotics addiction, in view of the fact that, in our present state of medical knowledge, no cure for addiction has been found. Thus, while a possessor of alcoholic beverages necessarily is engaged in a voluntary act, just the opposite would appear to be true of a person once addicted. The fact that the instant appellant has not been shown to have an addiction pre-dating the proscriptive statute is of no avail to appellee, since the "ex post facto" aspect of the law is apparent upon its face.

(8) *It Imposes Cruel and Unusual Punishment.*

The same is true of our position that the statute imposes cruel and unusual punishment. A statute may be unconstitutional upon its face or in its application. By necessary implication, since no provision is made for the tapering off of the condition and since the court may take judicial notice of what happens in "cold turkey" withdrawals, we re-submit that the law here involved is unconstitutional both upon its face and in its application. To negative this

position it is necessary for appellee to show that, although no provision for humane treatment of addiction of incarcerated addicts is provided in the law, such in fact is the practice of the California authorities. This, of course, would be impossible for appellee to establish.

**B. Section 11,721 of the California Health and Safety Code Is an Unreasonable Exercise of the Police Power, in That It Inherently Lends Itself to Police Abuse by Way of Arrest on Suspicion and Discriminatory Enforcement.**

For our discussion under this head, we shall quote from "Vagrancy Reconsidered": There are, in addition to the invalidity of the statutes themselves, constitutional objections to the practical results of the application of vagrancy legislation by law enforcement officials. Vagueness derived from the absence of a requirement of conduct is as significant in the administrative context as it is in questioning the prima facie constitutionality of the statutes.

The opportunities for abuse which status criminality inherently fosters are most apparent in the realm of police administration. Prevention of future criminality, the primary rationale of vagrancy laws, has little significance for law enforcement officials. There would appear to be slight concern with the "economic vagrant," the "offensive pest," or the "potential criminal." Rather the vagrancy laws, vaguely phrased, requiring no showing of specific criminal conduct for conviction, and under which arrest without a warrant is generally permitted, have provided the police with an effective tool for circumventing the "real or imagined defects in criminal law and procedure." Two major abuses are attributable to the immense discretionary power accorded the police.

(1) *Arrest on Suspicion.*

An officer may arrest for a felony without a warrant if he makes a showing of probable cause. An arrest without a warrant is illegal if made "without any reasonable belief by the officer in the guilt of the party arrested." Such an arrest is an intentional tort for which a civil action may be brought against the offending officer. Arrest without probable cause is also unconstitutional under the fourth and fourteenth amendments.

Deprived of the right to arrest merely on suspicion, the police have used vagrancy legislation to accomplish under color of legal right an illegal object. So long as the vagrancy laws exist there is a statutory misdemeanor available to justify the apprehension of a person suspected of a felony, and whether the suspect is subsequently convicted or acquitted under the vagrancy statute, or released without trial, the object has been accomplished with relative impunity.

The apparent ease with which the police are thus able to utilize the vagrancy statutes is based on two facts. First, with respect to a substantial proportion of suspects, their "utter impotence . . . is ample guarantee that they will not employ attorneys or otherwise annoy the police." Second, the vague definitions of vagrancy confer on an officer discretion so broad that technically he can seldom be held not to have had probable cause for the arrest.

Clearly, arrest on suspicion is a subversion of the several purposes for which the vagrancy statutes were enacted. For obvious reasons, discovery by the courts of such practices is difficult at best. It would seem that the abuse is not amenable to effective supervision by the judiciary. The fault lies more with the statutes than with the absence of appellate review.

(2) *Selectivity of Application and Equal Protection.*

While the equal protection clause of the fourteenth amendment is usually employed to invalidate discriminatory laws, selective and discriminatory application of valid laws is equally within its scope. Though there is evidence that state courts have "never been fully converted to the proposition," decisions in several jurisdictions reflect an awareness of deliberately discriminatory law enforcement. Selectivity in the application of law may be the product of quantitive exigency or of conscious policy. The difficulty usually results from the indefiniteness or breadth of statutory language, which poses for the police a potentially overwhelming problem in terms of numbers alone.

It is generally recognized, however, that "lax enforcement of a law or ordinance violates no constitutional rights." It is conscious selection which is abusive.

First, there is evidence that minority groups receive disproportionate attention. A Southern justice once indicated that the vagrancy laws should be rigidly enforced "against the colored population especially because many of them do lead idle and vagrant lives . . ." It is believed that this bias persists among law enforcement officials in certain areas of the country. Second, vagrancy statutes "have been used to harass (so-called) notorious criminals whom it is impossible to convict for major offenses." Attacks on such use of the statutes question the utility of selective enforcement.

The third aspect of selective application involves quasi-judicial regulation of undesirables. Here the selectivity is based less on the personal characteristics or past history of an individual than it is on "geographical" considerations. A "nonresident" vagrant is almost automatically subject to punishment while a person of identical description and

personal circumstances, except for the fact that he is not a transient, is less likely to be incarcerated.

Admittedly, any criminal statute can be administered capriciously by officials intent on prosecuting or harassing an identifiable class or group. The vagrancy laws, however, have been particularly amenable to such abuse because of their inherent vagueness. There is no specific criminal act upon which arrest and convictions are predicated. Again, the judiciary is confronted by the problem of supervising statutes which, under color of legal right, are easily used to perpetrate violations of constitutional rights. Supervision is not enough if the statutes are so drawn as to fail to insure "procedure which will protect persons against the ills arising out of the whims and caprice of officials."

The immediate result of properly drawn conduct statutes would be incarceration of those members of the vagrancy status groups who actually engage in criminal conduct. Crime would be prevented by apprehending criminals and applying sanctions commensurate with the offense. Adherence to traditional criminal theory also contributes to the long-range interest in crime prevention. The source of harm is properly identified and the relationship between harm and source is established when conduct is the foundation of law enforcement. The stimulus of punishment is properly directed toward the source of harm, the desired response can be predicted and the theory of deterrence is accommodated.

The second element of social concern—the "nuisance" aspect of the judicial rationale for punishment of vagrants—should be completely discarded. "The economic purposes which once gave vagrancy a function no longer exist, and the philosophy and practices of welfare agencies have so changed relief methods that a criminal sanction to enforce Elizabethan poor law concept is outdated." Penal legis-

lation should not reflect a concern, which, while a legitimate object of society's attention, is not the proper object of criminal sanctions. While the economic clauses of the vagrancy laws defer ostensibly to this proposition by providing that a man is never to be punished when he is unable to obtain employment, the distinctions between the unemployed and the alcoholics, degenerates, and idle wanderers frequently seem tenuous. Such social problems should be resolved through social welfare and rehabilitation measures.

Individual liberty is also protected through strict reliance upon conduct criminality. First, the provisions of statutes embodying conduct criminality define in comprehensible terms those acts which are subject to punishment, thus providing satisfactory criteria for the identification of the criminal and forewarning the individual of the consequences of specific conduct. Second, suspicion causation and the arbitrary attribution of criminal responsibility is replaced by a clear causative relation between the prescribed conduct and the resulting harm. Third, conduct criminality provides tangible standards which are amenable to effective judicial supervision. Legislation which tends to disguise the fact of arrest on suspicion is eliminated and the judiciary is able to distinguish more readily between bona fide arrests for the statutory misdemeanor and arrests which serve ulterior motives. Selective enforcement is also more easily revealed where there is a clear delineation of the grounds for arrest and conviction.

Comprehensive reform of the abuses attributable to status criminality can be effected only through legislation which completely abolishes the vagrancy concept—a doctrine which finds its only support in two centuries of uncritical American legislative and judicial acceptance of outmoded English precedent. "England got rid of that concept." It is time for America to do the same.

## Summary and Conclusion

We have no quarrel with the broad, general statement of appellee that laws regulating the use of narcotics are properly within state police power. However, the said statement does not beg the question, but rather skirts it. The question presented by our points and authorities is not whether states may legislate in this field, in the abstract, but whether the specific state provision goes beyond proper and constitutional sanctions or controls. Specifically, it is our contention that Section 11,721 penalizes a status of mental and physical illness of an involuntary nature. We further contend that such a penal approach is in contravention of the state and federal constitutional standards.

The United States Supreme Court case cited in support of this uncontradicted general power does not negative our position argued herein. And while certain cases cited by appellee do support the vagrancy laws generally, it is interesting that the legislature has now outlawed all vagrancy laws in the State of California (which were numerous and served as catchalls and traps for the unwary, there being twelve subheadings in Section 647 of the Penal Code), except for the residual one proscribing the status of addiction to narcotics. This latter was, as previously pointed out, originally included in the said vagrancy statute, later being given special treatment in the Health and Safety Code and being deleted from the Penal Code. The criminal approach to a status or condition remained intact, after the said legislative amendment.

The approach taken by the 1961 session of the California legislature in so outlawing the provisions which the courts strained to justify in the cited opinions, indicates an attempt to rid this State of the unconstitutional penalization

of status as such. That the one remaining such status was not included in the legislative effort might well have been merely an oversight.

Be that as it may, the Appellate Department of the Superior Court, in the instant case, has indicated the serious question in its mind re the constitutionality of the criminalization of the status of addiction, requesting, however, that higher courts than itself make such a determination. It is to that end that this appeal is taken.

A determination of unconstitutionality would not "render impossible laws which are generally admitted to be essential to the well-being of society." Laws prohibiting the non-medical dealing in narcotics would be untouched, and it is at this level that proscription has validity and may be effective. On the other hand, the invalidation of the criminal treatment of addiction would encourage a humane, medical treatment of the victims of illegal drug trafficking, which again is the only approach which would show some promise of accomplishing the legislative intent to curb the traffic.

Respectfully submitted,

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